

To: Michigan Supreme Court
From: Robert Agacinski, Janet Welch
Re: Proposed Revisions to Chapter 9 of the Michigan Court Rules
Date: April 7, 2010

This summary of the key differences between the recommendations for changes to the attorney discipline rules submitted by the Attorney Grievance Commission (AGC) and those submitted by the State Bar is offered jointly by the AGC and the Bar to assist the Court in its deliberations.

Background:

In the fall of 2006, pursuant to the direction of the AGC, the Grievance Administrator submitted comprehensive revisions of Chapter 9 of the Michigan Court rules, the attorney disciplinary procedural rules, to the Michigan Supreme Court for its consideration. At its April 9, 2009, administrative conference, the Court requested the State Bar of Michigan (SBM) to provide input on the proposed rules to the Court within 120 days. A Bar president-appointed workgroup submitted its proposal to the Board of Commissioners, which was adopted on July 24, 2009. The SBM proposal was submitted to the Court on August 6, 2009. With the knowledge of its Commission, AGC staff submitted a revised proposal which maintained certain, proposed rules disapproved by the SBM's workgroup, added new provisions, and corrected language. Since the submission of the two versions, there have been additional minor technical corrections to the AGC version, mostly made following discussion by the Court.

This summary addresses only five key issues upon which there is major disagreement : Grounds for discipline (9.104(A)); Administrator's ability to obtain medical records (MCR 9.112(E) of AGC draft); Discovery (MCR 9.115); Procedure for obtaining medical or psychological examination (MCR 9.121); Exemption of AGC staff from sanctions (MCR 9.128(F)). Each area of disagreement is explained below.

At several administrative conferences beginning in December of 2009, members of the Court have expressed a desire for a more complete side-by-side juxtaposition of the AGC and SBM versions of the full set of rules, with commentary. A separate document addressing that request will be submitted.

I. MCR 9.104(A) GROUNDS FOR DISCIPLINE

There are three general areas of disagreement within this category: whether Chapter 9 of the Court Rules should address the general grounds for misconduct, separate and apart from the grounds described in the Michigan Rules of Professional Misconduct (MRPC); how the provision concerning criminal conduct should be stated; and whether the existence of past conduct should form an independent basis for discipline. Both the MRPC and the Michigan Court Rules articulate grounds for discipline. The SBM's focus was in addressing redundancy and inconsistency between language pertaining to grounds for misconduct found in the MRPC and the Michigan Court Rules. The AGC prefers to maintain the status quo, for reasons set forth below.

A. Placement and Preferred Language

1. The AGC's Position as to Grounds for Discipline

The AGC recommends that MCR 9.104 be maintained and expanded. Removing all grounds of misconduct has facial attraction, but it is not practical nor desirable. Chapter 9 of the Court Rules contains other grounds which subject lawyers to discipline, such as MCR 9.113(A) (answers to a Request for Investigation) and MCR 9.120 (convictions). Respondent attorneys have also been charged with violating other court rules, such as MCR 5.313(compensation of an attorney in a probate case), or the abuse of the discovery process.

The workgroup did not consider that MCR 9.104 covers not only lawyers, it applies to judges. Removing MCR 9.104 (A)(1), (2), (3), and (5), would harm the ability of the Judicial Tenure Commission (JTC) to take disciplinary action against judges. MCR 9.104 is the court rule relied upon by the JTC in its prosecution of judges. Any changes to MCR 9.104 will necessarily impact the JTC.

The harm caused by the deletion of MCR 9.104(A)(1)-(3) and (5) is not cured by adding the suggested language in footnote 4 that a lawyer shall not “engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.” The suggested language is as general as the currently challenged language but without a history of case law and interpretation. It also would required an added element of proof on the part of the prosecution – i.e., that the conduct actually affected the lawyer’s practice of law. Except in the very rare case, the AGC would not have evidence to meet this added element.

Removal of the subject provisions would also harm the ability of the AGC to take disciplinary action in cases with unusual fact situations. Relying only on the language of the MRPC could result in an inability to bring charges for conduct such as engaging in sexual relations with one’s own client, noting that the MRPC does not have an explicit ban against such activity although such a ban is included in the ABA’s Model Rules. Additionally, in *Grievance Adm'r v Fried*, 456 Mich 234, 570 N.W.2d 262 (1997) the Court applied the language of MCR 9.104(A)(1)-(3) to conduct involving judge-shopping:

The alleged conduct falls squarely within these provisions. It is prejudicial to the administration of justice, because it is an undue interference with the proper assignment of cases under MCR 8.111...

The alleged conduct surely exposes the legal profession and the courts to contempt and ridicule----no reasonable person would

approve a system in which one can obtain a more lenient judge (and, presumably, a more lenient sentence) in a criminal case by paying \$1,000 to a judge's relative.

The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong. Thus the ADB majority properly concluded that “[m]any or perhaps most of the finest members of the bar would probably have nothing to do with the relatively blatant conduct alleged in the complaint.

The question before us today is simply whether the Grievance Administrator has stated a claim on which relief can be granted. He has.

Grievance Adm'r v Fried, 456 Mich at 244-245; 570 NW2d at 267.

In the AGC’s proposed changes to MCR 9.104(A)(4), the wording has been changed to be in accord with the terminology of the Michigan Rules of Professional Conduct. The AGC’s proposed change to MCR 9.104(5) reflects that misdemeanor convictions may enter based upon violations of local ordinance, including convictions where the defendant has abused substances such as drunk driving, disorderly conduct, and possession. Additionally, the change to the proposed rule would take cognizance of convictions entered in formalized tribal courts. MCR 9.104(A)(10) prohibits lawyers from entering, or seeking to enter into, settlement agreements with provisions which would conceal attorney misconduct. The Commission recommends the inclusion of a new rule under MCR 9.104(B), allowing prior discipline to be charged in the formal complaint. The inclusion of a Respondent’s prior disciplinary record is to show a pattern of misconduct and the fitness of a recidivist respondent, so that the public, the courts, and the legal profession may be protected.

2. The SBM Position as to Grounds for Discipline

The SBM favors elimination of any redundancy and clarifying any discrepancies between MCR 9.104 and the MRPC and otherwise restricting 9.104(A)¹

¹**Rule 9.104 Grounds for Discipline in General; Adjudication Elsewhere**

(A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

- (1) conduct prejudicial to the proper administration of justice;
- (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
- (3) conduct that is contrary to justice, ethics, honesty, or good morals;
- (4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;
- (5) conduct that violates a criminal law of a state or of the United States;
- (6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

disciplinary grounds to those pertinent to the disciplinary process itself, relying on grounds set forth in the MRPC as the general basis for disciplinary action. Because the MRPC was not the subject of the workgroup's review, the workgroup made recommendations only as to the language of 9.104. The SBM's version of 9.104² deletes current paragraphs (A)(1), (2), (3), and (5)³, as well as the AGC-proposed habitual offender rule.⁴ The eliminated provisions are either explicitly or implicitly covered by existing provisions of MRPC 8.4 or are overly-broad and vague. It is cleaner and more user-friendly to have the grounds for discipline stated clearly in one place rather than to have duplicative or non-identical language in two separate places within the court rules. Additionally, 9.104's provisions concerning "conduct that exposes the legal profession of the courts to

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- (7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
 - (8) contempt of the board or a hearing panel; or
 - (9) violation of an order of discipline.

(B) Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

² The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

- (1) ~~conduct prejudicial to the proper administration of justice;~~
- (2) ~~conduct that exposes the legal profession of the courts to obloquy, contempt, censure, or reproach;~~
- (3) ~~conduct that is contrary to justice, ethics, honesty, or good morals;~~
- (4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court;
- (5) ~~conduct that violates a criminal law of a state or of the United States;~~
- (6) knowing representation of any facts or circumstances surrounding request for investigation or complaint;
- (7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);
- (8) contempt of the board or a hearing panel; or
- (9) violation of an order of discipline.

³ Under MCR 9.104(A)(5), conduct that "**violates any criminal law of a state or of the United States**" is a ground for misconduct. Removal of MCR 9.104(A)(5) is not cured by reliance by MRPC 8.4(b) prohibiting a lawyer from engaging in "**conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.**" The restrictive language of MRPC 8.4(b) would affect disciplinary prosecutions under MCR 9.120, such as in *Grievance Adm'r v Deutch and Howell*, 455 Mich 149; 565 NW2d 369 (1997). In *Deutch*, this Court interpreted the applicability of MCR 9.104(A)(5) and MCR 9.120(B)(2), to convictions for drunk-driving related offenses. In the opinion authored by Justice Weaver, the Court overturned the Board's policy of dismissing all first-time drunk-driving offenses holding that "the filing of a judgment of conviction, is an evidentiary tool that allows the prosecutorial branch, the administrator, to expeditiously dispose of a case already adjudicated in the courts. While the judgment is not conclusive proof that discipline must be imposed, it does establish a finding of misconduct under MCR 9.104(5) and that a second-phase discipline hearing is warranted under MCR 9.115(J)(2) and (3)," *id.* At 455 Mich 160; 565 NW2d at 375.

⁴ The ADB representatives suggest that, if the Court adopts the workgroup's version of 9.104, a new paragraph (f) should be added to MRPC 8.4, which would read, "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

obloquy, contempt, censure, or reproach” and “conduct that is contrary to justice, ethics, honesty, or good morals” are vaguer and less defined than the language of the MRPC, which gives more precise guidance to the practitioner and the disciplinary system. Criminal conduct is already addressed by MRPC 8.4(b) and MCR 9.120. The potential impact of changes to MCR 9.104 on the disciplinary system for judges was beyond the scope of inquiry for the SBM workgroup. Clearly, the Judicial Tenure Commission has an independent ability to seek changes to its rules with the Supreme Court.

B. MCR 9.104(A)(5) Grounds for Discipline -- Criminal Conduct

MRPC 8.4(b) makes criminal violations the basis for disciplinary action “**where such conduct reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.**” Under MCR 9.104(A)(5), conduct that “**violates any criminal law of a state or of the United States**” is a ground for misconduct. The State Bar’s proposed changes to MCR 9.104(A) would eliminate 9.104(A)(5).

1. Summary of AGC Position:

The AGC opposes the elimination of MCR 9.104(A)(5). The qualifier of MRPC 8.4(b) requires a showing that the criminal misconduct adversely affect the lawyer’s honesty, trustworthiness, *or fitness as a lawyer*. This would tie criminal conduct to the lawyer’s actions as a professional, an approach which this Court rejected in *Matter of Grimes*, 414 Mich 483, 495; 326 NW2d 380, 384 (1982), when it held that a lawyer is a professional, twenty-four hours a day. Again, the SBM’s proposal would add an element of proof to be established by the AGC, that is, that the attorney’s condition actually affected his practice. This added element may result in the need for expert testimony, with attendant costs, or may simply go unmet and the case dismissed.

The AGC believes that the proposed change would substantively affect case law establishing that MCR 9.104(A)(5) can serve as the sole basis for the prosecution for any criminal conviction. See *Grievance Adm’r v Deutch and Howell*, 455 Mich 149 (1997). In *Deutch*, the Court provided a safety-valve where a panel could return a finding of misconduct but impose no discipline. The AGC also cites *State Bar Grievance Administrator v Gillis*, 402 Mich 286 (1978); reh. denied, 402 Mich 965 (1978), where the Court held:

Rule 16.18 [current MCR 9.120] supports the suspension of an attorney because of his conviction of willful failure to file an income tax return. The rule has an important expediting function in relieving the Administrator of the burden of establishing actionable misconduct under Rule 15, para. 2(5), against an attorney convicted of a serious crime. The use of the rule does not

require independent proof of misconduct; the facts of conviction alone established the Administrator’s case.

Removal of MCR 9.104(A)(5) is not cured by reliance by MRPC 8.4(b) prohibiting a lawyer from engaging in “**conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.**” The restrictive language of MRPC 8.4(b) would affect disciplinary prosecutions under MCR 9.120, such as in *Grievance Adm’r v Deutch and Howell*, 455 Mich 149; 565 NW2d 369 (1997). In *Deutch*, this Court interpreted the applicability of MCR 9.104(A)(5) and MCR 9.120(B)(2), to convictions for drunk-driving related offenses. In the opinion authored by Justice Weaver, the Court overturned the Board’s policy of dismissing all first-time drunk-driving offenses holding that “the filing of a judgment of conviction, is an evidentiary tool that allows the prosecutorial branch, the administrator, to expeditiously dispose of a case already adjudicated in the courts. While the judgment is not conclusive proof that discipline must be imposed, it does establish a finding of misconduct under MCR 9.104(5) and that a second-phase discipline hearing is warranted under MCR 9.115(J)(2) and (3),” *id.* at 455 Mich 160; 565 NW2d at 375.

2. Summary of SBM Position:

Elimination of MCR 9.104(A)(5) would not hamper discipline action because the grievance administrator has other provisions to rely upon in cases involving criminal violations. The MRPC qualifier is not prohibitively restrictive. Specifically, MRPC 8.4(b) does not contain language limiting the scope of criminal conduct addressed by the rule to criminal conduct that occurs in the course and scope of providing legal services. Rather, it allows the discipline system to address all criminal conduct that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. The concept of “fitness” could include issues raised by drug or alcohol offenses, to the extent that they are indicative of impairment generally. All felony convictions would continue to be captured by MCR 9.120.

C. **MCR 9.104 Grounds for Discipline: Proposed “Habitual Offender Rule”**

The AGC proposes adding a new ground⁵ for disciplinary action based on past conduct. The proposed rule would allow prior discipline to be charged in the formal complaint for the purpose of showing a pattern of misconduct:

“It is also misconduct and a ground for discipline if, through multiple acts and omissions, a lawyer demonstrates the absence of fitness to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counsel and

⁵ (The proposed rule would be MCR 9.104(B), while the current MCR 9.104(B) [reciprocal discipline] would be moved).

as an officer of the court. MCR 9.103(A). This is misconduct for which discipline can be imposed for the protection of the public, the courts, and the legal profession. MCR 9.105. In proceedings brought under this subrule, prior acts and omissions of the lawyer are admissible.”

1. Summary of AGC Position:

The AGC recommends allowing prior discipline to be charged in the formal complaint to establish a pattern of misconduct and going to the overall issue of the fitness of a recidivist respondent. Pursuant to MCR 9.103(A) "the license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court.” It can fairly be said that a disciplinary proceeding is to ensure the continued fitness of a subject lawyer. In Schwartz v Bd of Bar Examiners of New Mexico, 353 US 232, 77 S Ct 752, 761, 1 L Ed 2d 796 (1957), the Court reversed on due process grounds the denial of an applicant’s admission to the bar of the state on the basis of past membership in the Communist party. Mr. Justice Frankfurter opined:

It is a fair characterization of the lawyer’s responsibility in our society that he stands as a shield...in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as moral character.

The SBM states that the proposed habitual offender rule would conflict with MRE 404(b), but that is inaccurate. MRE 404(b) is an evidentiary tool with rigid guidelines as to the use of prior *similar* instances. While a recidivist respondent usually follows a pattern of ethical misconduct, it is not unheard of for a particular respondent to have engaged in conduct ranging across the pantheon of ethical violations.

2. Summary of SBM Position:

The proposed rule is overly broad, vague, is not limited to “prior discipline,” and would have the effect of undermining due process protections of the disciplinary procedural rules.

MCR 9.115(J) already mandates the inclusion of information about a respondent lawyer’s “previous misconduct” in a hearing panel’s report, which places prior misconduct squarely before the decision-maker at a hearing on discipline. The proposed rule would permit the introduction of prior conduct – not even prior

misconduct – before the fact finder has received any evidence pertaining to the currently alleged acts or omissions. Such a change would be unduly prejudicial to the respondent’s due process rights, for example, allowing the grievance administrator to reintroduce evidence from prior disciplinary actions in which the lawyer had prevailed, using that previously unpersuasive evidence as the basis for moving an action forward. The proposed rule places no limits on the types or nature of past conduct that could serve as the basis for discipline, and thus is broader than the primary grounds established by court rule. The AGC proposal would conflict with MRE 404(b) and represents a sharp departure from well-settled case law in Michigan that misconduct must be proven prior to the introduction of prior misconduct. In the case of *In re Daggs*, 411 Mich 304; 307 NW2d 66 (1981), the Court held, “only after a decision on the merits of the alleged misconduct is evidence of prior misconduct relevant for the formulation of an order of discipline.” Moreover, neither the proposed rule nor the AGC’s commentary identifies a problem that this rule is designed to correct.

II. MCR 9.112: Ability to Obtain Medical Records

The AGC proposes a new rule⁶ the application of which would be triggered by the existence of a genuine issue as to a material fact about a respondent’s

⁶Proposed Rule:

MCR 9.112(E) Access to Medical and Psychological Records

- (1) After the request for investigation has been served on the respondent, and where there is a genuine issue as to a material fact concerning the physical, mental, or emotional condition of the respondent, the administrator may demand the respondent waive applicable privileges and to permit the administrator access to existing records concerning the physical, mental, or emotional condition of the respondent. The release of information will take place in accordance with MCR 2.314(D).
- (2) Upon the conviction of an attorney, and upon the grievance administrator’s request, the court shall release to the grievance administrator a copy of any substance abuse assessments or psychological reports received by the probation department during the criminal action.
- (3) After the request for investigation has been served on the respondent, and where it appears that the respondent is not fit to engage in the practice of law, the administrator may request the respondent to submit to one or more independent examinations by licensed professionals of the administrator’s choosing, at the administrator’s expense. Where the respondent complies with such a request, the respondent may also be further examined by one or more licensed professionals of the respondent’s choosing, at the respondent’s expense.
- (4) When an examination is conducted pursuant to MCR 9.112(E)(2), the licensed professional must provide the administrator and the respondent with copies of the professional’s report with 28 days. The report will include a copy of the professional’s resume, an account of the history obtained from the respondent, a description of administered tests and their results, a diagnosis, a prognosis, and recommendations regarding treatment.
- (5) All records and reports gathered under MCR 9.112(E) are admissible for one year in disciplinary proceedings against the respondent and after their admission into the record, shall be retained *in camera*.
- (6) When a respondent refuses to comply with a demand by the administrator under MCR 9.112(E)(1) or (2), in a case in which the administrator has initiated formal proceedings, the hearing panel shall review the evidence and all

physical, mental, or emotional condition. In such cases, the grievance administrator could ask the respondent to waive any privileges necessary to facilitate access to medical and psychological records. If the lawyer refused to provide a waiver, the new rule would direct the hearing panel in a formal hearing to consider all inferences concerning a lawyer's physical, mental or emotional state in the light most favorable to the administrator. The AGC promotes the rule as useful in those cases in which there is reason to believe that a respondent's professional competence has been affected by substance abuse or mental disability. The SBM believes that the AGC is able to obtain the same or similar information in appropriate circumstances through other rules in the disciplinary process.⁷

A. Summary of AGC Position:

The amendment would allow the grievance administrator to obtain information on underlying causes of alleged misconduct and whether the lawyer is currently fit to represent the public. The goal of the proposed rule is to obtain information to

legitimate inferences regarding the relevant physical, mental, or emotional condition of the respondent in the light most favorable to the administrator.

⁷ **MCR 9.112(D)(1)** After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

MCR 9.121(B)

- (1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.
- (2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.
- (3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.
- (4) Pending disciplinary proceedings against the money must be held in abeyance.
- (5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

MCR 9.121(C)(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination by a physician selected by the hearing panel or the board, which physician shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. A Respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

help the AGC's oversight body (the Commission) assess a file brought before it with a recommendation by the administrator and his staff. Information obtained during the AGC's investigative stage is *confidential*. Obtaining this information during the investigative stage helps to form appropriate responses to a respondent's personal needs and problems if the alleged misconduct would not result in a lengthy suspension or disbarment. Quite often, this type of information is used to avoid a public disciplinary proceeding by fashioning confidential dispositions to ensure that an attorney receives treatment, etc. Thus, the public is protected and the attorney's reputation is not harmed.

The current rule structure does not provide the administrator with specific authority to obtain the information during the investigative stage. Under MCR 9.112(D)(1), subpoenas may issue to require the appearance of a witness or the production of documents. It does not contain specific authority to issue subpoenas to obtain medical or psychological records. Traditionally, this rule has not been used to obtain such medical, psychological, or substance-related information.

The other rules cited by the SBM take effect only *after* a public disciplinary proceeding has commenced. Further, under MCR 9.121(B), the AGC must first make a showing to a panel that an attorney is incapacitated, which without necessary records is, at best, a surmise and guess. It is only after a showing has been made, that the *panel* seeks out the information. There is no "mandate" requiring the panel to order the evaluation. The panel may deny the request. The incapacity rule is difficult to employ because the AGC usually does not have the medical reports, etc., needed to support such a petition. The other rule cited by the SBM, MCR 9.121(C), only comes into play when a *respondent* raises the issue and requests placement on probation. Although the rule states that a respondent must raise the request in the answer to a formal complaint, the board has held that this is not a requirement. *Grievance Adm'r v Harvey J. Zamek*, 98-114GA; 93-133-FA (ADB 1999). It is not unheard of for a respondent to make the request at the hearing on discipline.

The SBM challenges the rule as vague, suggesting that the language "fit to engage in the practice of law" is undefined. It is noted, however, that similar language was suggested by ADB representatives as the suggested replacement for the changes to MCR 9.104, as recommended by the SBM. As for timeliness of a request for such records, "current" fitness is the issue in disciplinary proceedings. See generally, *In the Matter of the Reinstatement Petition of William Leo Cahalan, Jr.*, No. 04-129-RP (ADB 2006).

B. Summary of SBM Position:

The SBM believes that there are sufficient rules which allow the administrator to obtain medical information in appropriate situations. The workgroup was not persuaded of the need for this rule, concluding that the existing rules adequately address the issue. The grievance administrator can secure subpoenas from the Commission requiring the production of documents “concerning matters then under investigation” [9.112(D)(1)]. If the subject matter of the investigation is an impairment issue, there is no articulated reason why existing records could not be sought through that existing mechanism. Where the grievance administrator alleges attorney incapacity, a hearing panel is mandated to take action necessary to determine that issue, including an examination by a qualified medical expert [9.121(B)]. Where the respondent defends by arguing impairment, the hearing panel may order the respondent to submit to an examination [9.121(C)(2)].

The State Bar also finds the language of the proposed rule to be overbroad and vague. Specifically, it has no time limitation or relevancy provision limiting what “existing records” could be obtained; it could apparently be triggered at any time after a request for investigation has been served, even before the grievance administrator had reached a conclusion about whether misconduct has occurred; and it does not specify what could trigger a “genuine issue as to a material fact” short of the filing of a pleading and a responsive pleading that factually conflict with each other. The very usage of the phrase “genuine issue as to material fact”, which emanates from summary judgment parlance, is inapposite as a standard for triggering an ability to mandate the waiver of applicable privileges to facilitate access to records, failing which there are irrebutable presumption consequences. There is no built-in mechanism for contesting the demand for a waiver of privileges, but a failure to comply would trigger all “legitimate” inferences regarding the physical, mental, or emotional condition of the respondent in the light most favorable to the grievance administrator.

The grievance administrator would be empowered to request the respondent to submit to one or more independent examinations where it “appears” that the respondent “is not fit to engage in the practice of law”. Because “fit to engage in the practice of law” is not defined in this context, it is not clear that the ability to seek an examination is limited to instances where the grievance administrator believes that the fitness issue relates to a physical, mental, or emotional condition of the respondent. Another paragraph provides that, upon the conviction of an attorney, and with no limitation about the type or level of crime, the grievance administrator could request and a court “shall release” any substance abuse assessments or psychological reports received by the probation department. Because there is no timeframe given relative to the conviction, presumably this could mean that assessments that occurred both prior and subsequent to the conviction could be obtained without regard to whether the crime was a drug or alcohol-related offense and even in the absence of “a genuine issue as to a

material fact” concerning the physical, mental, or emotional condition of the respondent.

III. MCR 9.115: Discovery

The State Bar proposes broadening the rule on access to relevant information and evidence. The current language⁸ pertaining to discovery during hearing panel procedures provides for a narrower scope of discovery than is provided in civil cases generally in the Michigan Court Rules. The AGC proposal essentially retains the current language of MCR 9.115(F)(4) with some very minor changes.

Under the current discovery rule, upon receipt of a demand made pursuant to this rule, a party must provide to the other party the names and addresses of persons to

⁸ MCR 9.115(F)(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

- (a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.
- (b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing. Upon receipt of a demand made pursuant to this rule, a party must also provide to the other party any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information.
- (c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.
- (d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings. If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

be called as a witness, make available for inspection or copying documentary evidence sought to be admitted at the hearing, and provide any statements given by witnesses to be called at the hearing. Witness statements include stenographic, recorded, or written statements of witnesses provided to the administrator, the respondent, or the respondent's representative. The term "written statement" does not include notes or memoranda prepared by a party or a party's representative of conversations with witnesses, or other privileged information. Under the SBM proposal, within 21 days following the filing of an answer, the administrator and respondent would be required to exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) non-privileged information and evidence relevant to the changes or the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

A. Summary of AGC Position:

The AGC opposes the proposed change to MCR 9.115(F)(4)(b)(ii) for several reasons: 1) The proposed rule is poorly written; 2) Disciplinary cases would result in unnecessary discovery battles; 3) Would result in the need for increased AGC attorney staff; and, 4) The confidentiality provisions of MCR 9.126 would be substantially eroded; The SBM's proposed rule is below:

Within 21 days following the filing of an answer, the administrator and respondent shall exchange the names and addresses of all persons having knowledge of relevant facts and comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent, and (2) other material upon good cause shown to the chair of the hearing panel.

The proposed rule is utterly ambiguous and not traditional to Michigan. The SBM rule would impose automatic discovery, which is a hallmark of the federal system, not Michigan's system. Nor, under the principles of statutory construction⁹ does it achieve the SBM's stated goals of simply broadening discovery without causing discovery battles.¹⁰ The question arises, then, what

⁹The principles that apply to statutory construction apply equally to interpretation of court rules. *Grievance Administrator v Underwood*, 462 Mich. 188, 193-194, 612 N.W.2d 116 (2000). Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp.*, 471 Mich. 540, 548-549, 685 N.W.2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent, *id.* at 549, 685 N.W.2d 275. In ascertaining legislative intent, this Court gives effect to every word, phrase, and clause in the statute, *id.* We must consider both the plain meaning of the critical words or phrases, as well as their placement and purpose in the statutory scheme, *id.* If the wording or language of a statute is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and we must enforce the statute as written, *id.* "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich. 57, 63, 642 N.W.2d 663 (2002).

¹⁰If the proposed rule were interpreted to add a civil discovery requirement, this would likely result in the need for a doubling of AGC staff, both secretarial and legal. The current staff is maxed out in its ability to maintain current

does the proposed rule do? It is so vague that a decent argument may be made either way over whether it creates a wholesale incorporation of the discovery rule because of the phrase “comply with reasonable requests for (1) non-privileged information and evidence relevant to the charges or the respondent”. “Requests” would likely take the form of interrogatories or requests to admit, hence, incorporating civil discovery. By any interpretation, however, the proposed rule allows an invasion of AGC files and records in conflict with MCR 9.126, and allows a panel of volunteer lawyers to decide whether a sister agency’s files and records to be invaded.

Essentially, the SBM’s proposed rule reflects a fundamental lack of understanding of the Michigan disciplinary process. Current case law states that disciplinary proceedings are quasi-criminal.¹¹ Criminal prosecutors do not engage in civil discovery. There is a tension, however, under MCR 9.115(A), which states that, unless otherwise provide, prosecution of disciplinary actions proceed as would a non-jury civil matter. MCR 9.115(A). Because of that language, discovery is limited to that provided under MCR 9.115. The AGC believes that a better analysis of disciplinary proceedings is that they are *sui generis*¹².

The proposed rule places a *res gestae* requirement on both parties, and is not limited to known *res gestae* witnesses. The phrase “comply with reasonable requests” is vague and overbroad and does not provide a mechanism for resolving disputes over what is “reasonable” or “relevant.” Further, it provides an ability to invade the confidential files and records of the Commission upon a showing of “good cause” again, a term which gives vast discretion to a panel as to what constitutes “good cause.”

The change would permit respondents to essentially invade AGC files and records, making every part of the Commission’s file arguably accessible. Each disciplinary proceeding would have the potential to result in a discovery battle that would then need to be decided by the discipline board to determine whether the confidential files and memoranda of the grievance commission would be disclosed to respondents. Adoption of the proposal rule would result in a substantive change to precedent set by such cases as *Grievance Adm’r v Attorney Discipline Board Tri-County Hearing Panel No. 69*, 447 Mich 1203, 525 NW2d (1994), *Grievance Adm’r v Attorney Discipline Bd.*, 444 Mich 1218, 515 NW2d 360 (1994), *Anonymous v Atty Grievance Comm’n*, 430 Mich 241, 255, 422 NW 2d 648 (1988).

case load. Members of the public who file against attorneys are already frustrated by the legal process and forcing them to sit through lengthy depositions would simply add to their frustration.

¹¹ See generally, *Anonymous v Attorney Grievance Commission*, 430 Mich 217 (1988); *State Bar Grievance Adm’r v Baun*, 395 Mich 28, 232 NW2d 621 (1975); *State Bar Grievance Adm’r v Jackson*, 390 Mich 147, 211 NW2d 38 (1973); and *State Bar of Michigan v Woll*, 387 Mich 154, 194 NW2d 835 (1972).

¹²See proposed change to MCR 9.105 to include language providing that “disciplinary proceedings are *sui generis*.”

Further, it would harm the flow of information to the administrator regarding attorney misconduct. Under MCR 9.109(B)(9), the administrator may issue a request for investigation under his own name. Many such requests for investigations are based upon information provided by judges and lawyers who believe that they have a reporting obligation under MRPC 8.3, but who do not want to be a listed complainant. The source of the information is not discoverable by a respondent attorney. The persons providing the information are analogous to a confidential informant. Changes to this rule would make that information discoverable.

B. Summary of SBM Position:

The State Bar endorses a broadening of the current provisions in the belief that a limited broadening of discovery will increase the quality of disciplinary proceedings. During the workgroup meetings, the AGC representatives posited two principal arguments against a broadening of discovery. The first was that it was unnecessary because the present grievance administrator has an “open file” policy. Because that policy is not contained in the rules, however, it could change with a change in administrators. The second argument was that such a change would alter existing case law, which acknowledges that discovery beyond what is currently provided for in the rules cannot be obtained because it is not provided for in the rules – an argument viewed as circular by the other members of the workgroup.

Currently, absent a showing of good cause, the only depositions permitted are of witnesses who live out of state or are physically unable to attend the hearing. [9.115(F)(4)(9)(c)]¹³. There is no general ability to seek the identification of persons with knowledge of relevant facts or to employ traditional methods of paper discovery.

The provision addressing the production of witness statements [9.115(F)(4)(b)(ii)] is narrower in scope than MCR 2.302(B)(3)(b) and (c), as it limits witness statements to those provided “to the [grievance] administrator, the respondent, or the respondent’s representative” and excludes from the definition of “witness statement” notes or memoranda prepared by a party or a party’s representative “of conversations with witnesses, or other privileged information.” Such a narrow formulation means that the grievance administrator can frustrate a respondent’s attempt to get an advance look at what a witness might say by merely taking notes of a witness interview and assuring that the witness does not write down what he or she remembers or intends to testify about.

Nothing in the proposed language asserts an engrafting of court rules pertaining to all available discovery tools into the disciplinary procedural rules, nor was that the intention of the modest changes being proposed by the SBM. The AGC’s

¹³ The AGC proposed changes to this rule to include: (3) Upon a showing of good cause by a party, a panel may permit a witness to testify by means of telephonic, voice, or video conferencing.

assertion that this modest change would necessarily foment endless discovery battles in every case expresses no confidence in the caliber of lawyers on both sides of the aisle who practice in the area of attorney discipline, a position with which the SBM heartily disagrees.

IV. MCR 9.121 Procedure to Obtain Medical or Psychological Examination

The AGC representatives and the rest of the workgroup differed sharply on how the process should work when the grievance administrator alleges incapacity in a complaint filed under MCR 9.121¹⁴. The AGC and the SBM agree that the current rule needs substantial revisions. It is the manner of the revision that has caused disagreement with each proposing a different version.¹⁵ The areas of

¹⁴ MCR 9.121(B)(1) currently provides:

If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.

¹⁵ **AGC Version**

(a) Independent examination.

- (1) Upon demand by the administrator or pursuant to an order of a panel, a respondent may be required to submit to one or more medical examination or psychological examination(s) by board-certified or other licensed professionals. Within 30 days of the conclusion of the examination and testing, the medical examiner shall prepare a report which includes:
 - (A) The expert=s resume or curriculum vitae;
 - (B) A statement of facts, and a list of the tests which were administered and the test results;
 - (C) A diagnosis, prognosis, a statement of limitations on the opinion because of the scope of the examination or testing, and recommendation for treatment, if any; and
 - (D) No physician-patient privilege shall apply under this rule.
 - (2) The independent medical examiner shall provide the report to the panel, the administrator and the respondent. The report shall be admissible into evidence in the proceedings.
 - (3) The respondent is entitled to be examined by a qualified professional at his or her own expense, but such examiner shall prepare a report in accord with this rule. The respondent shall provide a copy of the report to the administrator within 30 days of the date of its preparation. Failure to provide a timely copy of the report to the grievance administrator shall result in the inability of the respondent to offer the report into evidence at any subsequent formal disciplinary proceeding. The report is otherwise admissible into the record.
- (2) The hearing panel shall When the administrator files a petition to transfer ~~provide notice to the~~ an attorney ~~of the proceedings~~ to inactive status, the petition shall be served on respondent according to the provisions of MCR 9.115(C).

disagreement include: (1) what is required to compel a respondent to submit to an examination and its scope; (2) how the expert is selected; (3) under what circumstances the report generated is admissible; and (4) under what circumstances the hearing panel appoints an attorney to represent the respondent.

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- (3) Upon the request of a party, or on its own motion, and following a finding of good cause, a panel may recommend the appointment of counsel by the board and appoint an attorney to represent the respondent if he or she is without representation.
- (4) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.
- (5) Pending disciplinary proceedings against the attorney shall be administratively closed without prejudice to future prosecution upon the return of the lawyer to active status must be held in abeyance.
- (6) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

SBM Proposal:

- (a) Examination:
- (1) Upon a showing of good cause that a mental or physical condition is the basis of respondent's incompetency or incapacity as alleged in a complaint by the administrator, a hearing panel may order respondent to submit to one or more medical examination(s) or psychological examination(s) that are relevant to a condition of respondent shown to be in controversy.
- (2) If testing is ordered, the administrator and respondent may stipulate to the expert(s) who will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings, subject to relevancy objections.
- (3) If the administrator and/or respondent hire their own expert(s) to conduct the examination(s), the experts(s) will conduct the examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. A report prepared pursuant to this paragraph is only admissible as substantive evidence upon stipulation by both parties. The respondent will be responsible for the expenses incurred by retaining his or her examiner.
- (4) On its own motion or on the motion of either party, the hearing panel may appoint an expert of its own selection to conduct the necessary examination(s). The expert so appointed will conduct the necessary examination(s), prepare a report within 28 days of the conclusion of the examination(s), and provide a copy of said report to both parties. The content of a report prepared by an expert(s) pursuant to this paragraph is admissible into evidence in the proceedings unless, within 14 days of delivery of the report, a party objects, in which case either party may subpoena the expert to testify at the hearing at that party's expense.
- (b) Experts Report:
The expert's report required by paragraph (a) shall include:
- (i) The expert's resume or curriculum vitae;
- (ii) A statement of facts, and a list of the tests which were administered and the test results;
- (iii) A diagnosis, prognosis, a statement of limitations on the option because of the scope of the examination or testing, and recommendation for treatment, if any; and
- (iv) No physician-patient privilege shall apply under this rule.

A. Summary of AGC Position:

The AGC believes that the current rule needs to be substantially revised to provide mechanisms to establish whether an attorney is incapacitated. There are increasingly matters involving the aging attorney populace, attorneys suffering from advanced substance abuse, and those who may be suffering from psychological or emotional ills. Currently, it is almost impossible to bring an incapacitation proceeding. Investigation is limited in these situations because there is no specific authorization to obtain medical or psychological records in such circumstances. Once an incapacitation proceeding is brought there are few guideposts on how the matter is to proceed. Case law is almost non-existent because few cases are brought due to the poor structure of the rule.

The AGC's version states that upon the administrator's demand, or a panel's order, a respondent may be required to submit to "one or more" medical or psychological examinations. Some attorneys suffer from co-occurring disorders. It is not infrequent to see depression coupled with substance abuse, or a medical condition coupled with an emotional disorder. A report must then be submitted by the expert within 30 days to the board, the administrator, and the respondent. The AGC and the SBM agree on the contents of the report to be submitted by the expert. Under the AGC version, the report is admissible into evidence. Either side would retain the ability to subpoena the expert to testify at the proceeding, as would any party pursuant to MCR 9.115(F)(4). The AGC version entitles a respondent to seek their own expert and have the report admitted, but only if a copy of it is provided to the administrator within 30 days of its preparation. This would prevent a respondent, or respondent's counsel, from waiting until the day of the hearing to provide the information, an event that happens all too frequently.

The SBM's version fails to discuss how the AGC will be able to make a good cause showing if it is unable to demand that a respondent submit to testing, either in response to an incapacity petition or under the new, proposed MCR 9.112 (E).

B. Summary of SBM Position:

The SBM concludes that the AGC proposal does not provide sufficient guidance and protections concerning compelled physical and psychological examinations. The SBM's proposed rule would require a showing of good cause that a mental or physical condition is the basis of the incompetency or incapacity before an examination could be compelled and would limit examinations to those "relevant to a condition of respondent shown to be in controversy." If examinations are to be compelled and admissible in the proceedings, the workgroup version provides that the rule should provide the conditions for selection of the expert. The SBM version provides for three different scenarios: (1) where the administrator and respondent stipulate to the selection of the expert, the report is admissible subject to relevancy objections; (2) where either the administrator or the respondent hire

their own, the report is admissible as substantive evidence only upon stipulation by both parties; (3) where the hearing panel appoints an expert, the report is admissible unless, within 14 days of delivery, a party objects, in which case either party can subpoena the expert to testify at the hearing at that party's expense.

The SBM provision pertaining to the appointment of an attorney to represent an unrepresented respondent is unchanged from the current rule, which makes the appointment mandatory if a respondent is without representation. The AGC would make appointment discretionary, a situation that the rest of the SBM workgroup believe is undesirable.

V. **Limitations on Assessment of Costs**

The AGC recommends adoption of a new rule, 9.127(F), on assessment of costs, that would provide: "Other than for costs assessed under this rule, sanctions in the form of fines or costs are unavailable in disciplinary proceedings, except that, in granting an adjournment, a panel may require that a party pay costs associated with witnesses." The exemption is intended to offer protection not addressed by the civil immunity rule.

A. Summary of AGC Position:

The AGC believes that in the absence of such a provision it is possible that disciplinary proceedings could be burdened by the delay and expense of pernicious collateral attacks. The SBM believes that such a rule should not be put in place because of the possibility of a rogue AGC employee. There has never been an AGC employee actually sanctioned for their conduct in a disciplinary action, however, there have been numerous requests for sanctions brought for tactical reasons by the respondents' bar. Despite the fact that formal complaints must be authorized by the Commission before they are filed, and that staff counsel have little discretion, the respondents' bar has repeatedly sought sanctions against individual staff counsel for prosecuting a formal complaint. This occurs despite the administrator actually signing the complaint. This tactical request distracts from the purpose of the proceeding and is brought simply to intimidate AGC staff counsel.

The SBM argues that sanctions are necessary so that "lawyers engaged in prosecuting attorney discipline [cannot] avoid sanctions applicable to all other lawyers." This is not true. If a staff attorney engages in misconduct, there is nothing to prohibit an individual from contacting the administrator concerning his employee or from filing a request for investigation. The AGC's proposed rule prohibits *both* sides from requesting sanctions, except for certain witness costs.

The State Bar states that the AGC could seek sanctions against a respondent, however, this again loses sight of the purpose of discipline – to protect the public, the courts, and the legal profession. Collateral battles over sanctions would bog

down the system and would result in the need for increased staff at the AGC. Currently, staff does not log time on their files. If staff is to start keeping track of their hours so that sanctions may be sought, then the extra burden would result in the need for more employees at the AGC.

B. Summary of SBM Position:

The State Bar is not persuaded that the proposed change advances any necessary purpose, and further believes that eliminating the possibility of sanctions in appropriate cases could be contrary to justice. Existing Rule 9.125 already provides immunity from suit to a broad array of persons associated with the investigation and prosecution of complaints against lawyers “for conduct arising out of the performance of their duties.” The SBM workgroup concluded that avoidance of sanctions beyond this immunity is not justified or necessary, and that it would send an inappropriate message if the lawyers engaged in prosecuting attorney discipline could avoid sanctions applicable to all other lawyers. In addition, because of this proposed provision’s placement in a rule pertaining to “costs” that otherwise addresses costs taxed against a respondent, the workgroup believes that the proposed change inadvertently places a clear and inappropriate limitation on costs that could be assessed against *respondents* in a disciplinary proceeding. The SBM workgroup members other than the AGC representatives believed that such a provision is unnecessary given present protections, and dangerous in the rare circumstance in which a disciplinary employee might be engaging in serious misconduct related to a case.